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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Conservatorship of the Person and Estate of M.C.	
KERN COUNTY PUBLIC CONSERVATOR, Petitioner and Respondent, v. M.C., Objector and Appellant.	F077618 (Super. Ct. No. MI-006278-02) **OPINION**

APPEAL from an order of the Superior Court of Kern County. Thomas S. Clark, Judge.

Rudy Kraft, under appointment by the Court of Appeal, for Objector and Appellant.

Mark L. Nations, County Counsel, and Kathleen Rivera, Deputy County Counsel, for Petitioner and Respondent.

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A jury found appellant was gravely disabled. The trial court entered an order appointing a conservator of her person and estate pursuant to the Lanterman-Petris-Short Act (LPS; Welf. & Inst. Code, § 5000 et seq.).[1] The order also imposed certain legal disabilities on appellant. Appellant challenges these disabilities, raising claims of procedural error and insufficiency of the evidence. She also contends that if the procedural errors are deemed forfeited or waived, the disabilities must be stricken because they were entered as the result of ineffective assistance of counsel.

We conclude the record contains substantial evidence supporting the imposition of the legal disabilities. A declaration from a treating psychiatrist contains opinions relating to each disability. These opinions and the diagnosis that appellant suffered from schizoaffective disorder—symptoms include hallucinations and delusions—amply support findings that allowing appellant to drive or possess a firearm would be a danger to herself and others. The psychiatrist's opinions, the diagnoses of appellant, and her treatment history support the imposition of disabilities relating to the right to refuse or consent to medical treatment. Similarly, the evidence supports restricting appellant's right to enter into contracts in excess of $15. In contrast, the order stating appellant "shall not retain the right to vote" is contrary to the trial court's explicit finding that she "is capable of completing an affidavit of voter's registration" and must be vacated on the ground that the standard set forth in Elections Code section 2208 was not met.

As to appellant's claims of procedural error, they were forfeited because they were not raised during the trial court proceedings. As to the claim of ineffective assistance of counsel, the record on appeal is insufficient to establish the necessary facts.

We therefore affirm the order in all respects except its imposition of a voting disability.

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[1] Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2018, appellant was 38 years old and subject to a conservatorship. She was placed in a "board and care," which is an open facility (i.e., unlocked) that provides a place to live and 24-hour staff who manage medication and ensure the clients have three meals a day and snacks. In January, appellant was absent without leave from the board and care facility three times. The third time, she could not be located, her conservatorship case was dropped, and the conservatorship terminated.

On February 16, 2018, appellant was observed walking down a street and engaging in unusual behavior. Briana Tucker, a Recovery Specialist III with the Kern Behavioral Health and Recovery Services, spoke with appellant and asked her a variety of questions. Appellant could not answer many of the questions. Tucker described appellant as rambling, making poor eye contact, and extremely disheveled. Tucker then asked questions relating to appellant's ability to obtain food, clothing and shelter. Appellant was unable to remember the last time she had eaten and could not identify a place where she could stay.

After 35 to 45 minutes of interacting with appellant, Tucker advised her that she was being placed on a section 5150 hold for grave disability. Appellant began to walk away and was detained by law enforcement officers. Appellant was admitted to Bakersfield Behavioral Healthcare Hospital under a 72-hour hold. Upon admittance, she was placed under the direct care of a psychiatrist, Franco Song, M.D. Dr. Song had been appellant's treating physician at least once in 2017. A urine toxicology screen was performed to determine if appellant was under the influence of drugs. The results were negative.

On February 18, 2018, two days after appellant was admitted to Bakersfield Behavioral Healthcare Hospital, she was certified for involuntary treatment for a period of no more than 14 days. (See § 5250 [14 days of treatment related to mental health

disorder].) At a certification review hearing a few days later, appellant's certification was sustained on the ground of grave disability. On February 23, 2018, Dr. Song sent a referral letter to the Kern County Public Conservator (Public Conservator). (See § 5008, subd. (d) [definition of referral].)

On March 2, 2018, the Public Conservator filed a petition for the appointment of a conservator of the person and estate of appellant pursuant to the LPS on the ground she was gravely disabled as the result of a mental disorder. (§§ 5008, subd. (h)(1)(A) [definition of gravely disabled], 5350.) The petition alleged appellant could not provide her basic needs for food, clothing or shelter. Various documents generated from Tucker's conversation with appellant and her subsequent hospitalization were attached to the petition. Also, the petition stated: "Additional information supporting the request for appointment of a Conservator will be more fully set forth in the Conservatorship Investigation Report to be filed with this court prior to the hearing."

The petition alleged there were no suitable alternatives to a conservatorship. It requested the power to authorize psychiatric treatment and to detain appellant in a facility providing intensive treatment pending a final determination of the proceeding. As to the six legal disabilities that are the subject of this appeal, the petition alleged all of them should be imposed. The allegation was supported by the one-page declaration of Dr. Song dated February 23, 2018, which set forth his opinion as to the need for imposing each legal disability.

On March 5, 2018, the superior court appointed a temporary conservator and issued letters of temporary conservatorship stating the conservatorship would terminate on April 4, 2018. The order also imposed the legal disabilities listed in the petition. Twice the court extended the temporary conservatorship.

On April 24, 2018, appellant was transferred from Bakersfield Behavioral Healthcare Hospital to the Crestwood Bakersfield Mental Health Rehabilitation Center

(MHRC), a locked facility that is a long-term care unit for individuals who required a high level of care. At that time, appellant stopped being a patient of Dr. Song and became a patient of Dr. Jagdeep Garewal. Dr. Garewal is a psychiatrist employed by Crestwood Behavioral Health with 12 patients in its acute care unit, 55 patients in MHRC, and 16 patients in a structured board and care called the Bridge program.

On May 7, 2018, a jury trial began. Tucker, Dr. Song and Dr. Garewal were among the witnesses presented by the Public Conservator. Appellant also testified. She agreed she had a mental illness and with the diagnosis of bipolar one and schizoaffective disorder. She stated that she was taking medication three times a day at MHRC. On May 14, 2018, the last witness testified, counsel presented their closing arguments, and final instructions were given to the jury. Later that morning, the jury returned a unanimous verdict finding appellant was gravely disabled due to a mental disorder.

After the jury was discharged, the trial court, counsel and a deputy conservator addressed the next steps in the proceeding. They discussed the preparation of an order, the length of the conservatorship, the scheduling constraints of appellant's trial counsel, and the need for the court to make a finding of fact for the least restrictive placement. Counsel for the Public Conservator stated she would draft the order and provide it to appellant's attorney for review. She also stated she did not think a hearing was needed if the order met everyone's approval. The court stated, "I tend to think it will be just as eas[y] to have a hearing and more transparent for [appellant]." Appellant's attorney stated, "Since Your Honor has presided over the trial, all the facts are there. I'll be submitting. I think the order has to have an actual termination date." The court set a hearing to consider the proposed order and hear any objections. The court directed counsel for the Public Conservator to circulate the proposed order at the earliest opportunity so appellant would have adequate time to prepare and present any objections.

Appellant's attorney stated she would be on vacation and gave the name of the attorney who would appear in her place at the hearing.

On May 25, 2018, the hearing was held to review the proposed order and the proposed letters of conservatorship. No witnesses testified, and no reports or other documents were submitted to the court. The court interlineated some corrections and signed the order. The order stated appellant was gravely disabled, no suitable alternative to a conservatorship was available, and the least restrictive and most appropriate placement for appellant was a locked skilled nursing facility. As to the imposition of legal disabilities, the order found it would be dangerous for appellant to possess a firearm or operate a motor vehicle and also found appellant lacked the capacity to (1) enter into contracts in excess of $15, (2) give informed consent to routine medical treatment, and (3) give informed consent to treatment related to her mental disorder. The order stated appellant was "capable of completing an affidavit of voter's registration." Based on these findings, the order imposed all of the disabilities listed in section 5357. Appellant filed a timely appeal.

DISCUSSION

I. GENERAL PRINCIPLES GOVERNING CONSERVATORSHIPS

Chapter 3 of the LPS (§ 5350–5372) addresses conservatorships for gravely disabled persons. "Gravely disabled" means, among other things, a condition in which a person is unable to provide for his or her basic personal needs for food, clothing, and shelter because of a mental health disorder. (§ 5008, subd. (h)(1)(A).) Conceptually, being "gravely disabled" is not the same as being "a danger to others" or being a danger to oneself (§ 5150, subd. (a)), although it is possible for a gravely disabled person to fit these other standards. (See § 5008, subd. (h)(B).)

Placement in an LPS conservatorship does not automatically result in the person forfeiting legal rights or suffering legal disabilities. (*Conservatorship of George H.*

(2008) 169 Cal.App.4th 157, 165 (*George H.*); § 5005.) Rather, the trial court must determine separately (1) the disabilities imposed upon the conservatee, (2) the duties and powers of the conservator, and (3) the level of placement appropriate for the conservatee. (*George H., supra*, 169 Cal.App.4th at p. 165; §§ 5357 [powers of conservator, disabilities of conservatee], 5358 [placement in least restrictive alternative].)

The six subdivisions of section 5357 list special disabilities that must be addressed in the report generated by the officer providing the conservatorship investigation. (See §§ 5008, subd. (g) [definition of conservatorship investigation], 5351 [county's designation of agency to provide conservatorship investigation], 5354 [conservatorship investigation and officer's written report].) The report shall recommend for or against imposing special disabilities relating to (1) driving, (2) voting, (3) possessing firearms, (4) entering contracts, (5) refusing or consenting to routine medical treatment, and (6) refusing or consenting to medical treatment specifically related to the mental health disorder causing the grave disability. (§ 5357, subds. (a)–(f).)

A proposed conservatee has the right to demand a court or jury trial on the issue of whether he or she is gravely disabled. (§ 5350, subd. (d)(1).) If a proposed conservatee demands a jury trial, the jury also shall decide the factual question relating to the voting disqualification. (§ 5357, subd. (c); Elec. Code, § 2208, subd. (b); see CACI Nos. 4000 [essential factual elements to placement in conservatorship], 4012 ["gravely disabled" explained], 4013 [disqualification from voting].)

The conservatorship imposed under chapter 3 of the LPS shall automatically terminate one year after the appointment of the conservator. (§ 5361.) If the conservator determines the conservatorship is still required, then the conservator may petition the court for reappointment as conservator for a succeeding one-year period. (*Ibid.*) The conservator bears the burden of producing evidence to support the imposition of special

disabilities when a conservatorship is continued for another year. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1578 (*Walker)*.)

During the initial one-year term covered by an LPS conservatorship, conservatees have the statutory right to challenge the special disabilities imposed. (§ 5358.3.) At any time during an LPS conservatorship, whether during the initial or subsequent periods, a conservatee may petition the court pursuant to section 5358.3 for a hearing to contest the disabilities imposed under section 5357. While there is no timing restriction on the first such petition, subsequent petitions may not be filed until six months after the filing of the prior petition. (§ 5358.3.) Furthermore, a conservatee's right to challenge the special disabilities pursuant to section 5358.3 does not preclude a conservatee from seeking appellate review of the imposition of special disabilities. (*Walker*, *supra*, 206 Cal.App.3d at p. 1579 [question of special disabilities remanded for further proceedings].)

II. CLAIMS OF PROCEDURAL ERROR

Appellant contends the trial court committed two procedural errors before it signed the written order imposing the legal disabilities. First, she contends the "court did not receive evidence supporting the imposition of disabilities." Second, notwithstanding the contents of the written order, appellant contends the court "never actually ordered the imposition of the special disabilities." This contention appears to mean that the court did not (1) consider each disability separately, (2) evaluate the evidence for or against the imposition of the particular disability, and (3) make findings of fact based on the evidence to support the imposition of each disability. In appellant's view, the special disabilities were included in the proposed order prepared by counsel for the Public Conservator as a matter of routine and the court signed the order as though the imposition of disabilities was a foregone conclusion.

The Public Conservator contends the special disabilities were properly imposed and, moreover, the procedural errors now asserted on appeal were waived or forfeited

because appellant did not raise the issues in the trial court. We agree the claims of procedural error have been forfeited.

Ordinarily, an appellate court will not consider procedural defects or erroneous rulings related to the relief sought " 'where an objection could have been but was not presented to the lower court by some appropriate method.' " (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185, fn. 1.) Sometimes, the failure to object involves intentional acts or acquiescence, which are appropriately classified under the headings of estoppel or waiver. (*Ibid.*) " 'Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.' " (*Ibid*, italics omitted.)

Here, the attorney representing appellant at the May 25, 2018 hearing did not argue the trial court was required to (1) take additional evidence relating to the imposition of the special disabilities, and (2) render an oral ruling as to each disability. These claims of procedural error easily could have been addressed if they had been raised at the hearing. Consequently, we conclude appellant has forfeited those claims of error. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 [forfeiture is the failure to make the timely assertion of a right and is distinct from waiver, which is the intentional relinquishment of a known right].)

III. SUFFICIENCY OF THE EVIDENCE

Questions as to the sufficiency of the evidence are not subject to forfeiture and, consequently, objections need not be raised in the trial court to preserve the issue for appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1128.) Accordingly, we address appellant's contentions that the imposition of each disability is not supported by substantial evidence. (See *Walker*, *supra*, 206 Cal.App.3d at pp. 1577–1578 [substantial evidence standard applies to findings of fact; appellant did not waive issue by failing to present evidence related to the special disabilities].)

A. Right to Vote

"[T]he right to vote may be the most fundamental of all" constitutional rights. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913; see Cal. Const., art. II, § 2.) Under the LPS, a conservatee may be disqualified from voting if certain procedural steps are completed and the requisite findings made. (§ 5357, subd. (c).) One requirement is that the disqualification from voting be made pursuant to Elections Code section 2208. (§ 5357, subd. (c).) Subdivision (b) of Elections Code section 2208 provides: "If the proceeding under the Welfare and Institutions Code is heard by a jury, the jury shall unanimously find by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process before the person shall be disqualified from voting."

In this case, the verdict reached by the jurors addressed whether appellant was presently gravely disabled due to a mental disorder. The jury was not instructed to decide whether appellant could communicate a desire to participate in the voting process. (See CACI No. 4013 [disqualification from voting].) Instead, the trial court's May 25, 2018 order addressed the subject of appellant's voting rights by finding that "Conservatee is capable of completing an affidavit of voter's registration."[2] Despite this finding, the court imposed the following disability: "Conservatee shall not retain the right to vote."

The Public Conservator's appellate brief "acknowledges that the standards set by California Elections Code § 2208 have not been met in this case. Elections Code § 2208

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[2] This finding tracks language in the version of Elections Code section 2208 in effect prior to its amendment in 2015. (See Sen. Bill No. 589 (2015-2016 Reg. Sess.) Stats. 2015, ch. 736, §§ 6, 6.5, pp. 5534–5535, eff. Jan. 1, 2016 [current version of Elec. Code, § 2208].) Under earlier versions of the statute, the jury was required to "unanimously find that the person is not capable of completing an affidavit of voter registration." (Sen. Bill No. 1547 (1994 Reg. Sess.) Stats. 1994, ch. 920, § 2, p. 4733, eff. Jan. 1, 1995; see Assem. Bill No. 1311 (2013-2014 Reg. Sess.) Stats. 2014, ch. 591, § 1, p. 4071, eff. Jan. 1, 2015 [amendments did not change subd. (b) of Elec. Code, § 2208]; see also, 38 Cal.Jur.3d (2014) Incompetent Persons, § 138, p. 354.)

states in pertinent part … that if a proceeding under the Welfare and Institutions Code to appoint a conservator is heard by a jury, then the jury must unanimously find by clear and convincing evidence that the conservatee cannot communicate a desire to participate in the voting process before the person shall be disqualified from voting. (Cal. Elec. Code § 2208.)" Having made this one-sentence acknowledgement, the brief makes no other mention of appellant's right to vote. By requesting this court deny the appeal, the Public Conservator implies that there is no reason to remedy the errors relating to appellant's right to vote.

Based on the absence of a finding by the jury that appellant could not communicate a desire to participate in the voting process and the explicit finding in the written order that appellant is capable of completing an affidavit of voter's registration, we conclude the special disability stating appellant "shall not retain the right to vote" is tainted by procedural error and is contrary to the trial court's factual findings. Consequently, that portion of the order must be reversed. Furthermore, if necessary to undo the effect of the erroneous imposition of the voting disability, the trial court shall notify the Secretary of State and the county elections official that appellant has the right to register to vote. (Elec. Code, § 2210, subds. (b), (c) [notice for restoration of right to register to vote].)

B. Danger Posed by Vehicles and Firearms

The Public Conservator's petition alleged that it would be dangerous for appellant to possess a firearm or other dangerous weapon[3] or to operate a motor vehicle. Attached

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3 "The disqualification of the person from possessing a firearm pursuant to subdivision (e) of Section 8103" is one of the special disabilities listed in the LPS. (§ 5357, subd. (f).) Section 8103, subdivision (e)(1), provides that no person who has been placed under conservatorship pursuant to the LPS for being gravely disabled as a result of a mental disorder shall possess "any firearm or any other deadly weapon while under the conservatorship, if at the time the conservatorship was ordered or thereafter, the court that imposed the conservatorship found that possession of a firearm or any other deadly weapon by the person would present a danger to the safety of the person or to others."

to the petition was the February 23, 2018 declaration of Dr. Song. The declaration stated his opinion that possession of a firearm and other dangerous weapons by appellant would constitute a danger to her safety and to the safety of others. The declaration also stated his opinion that it would be a danger to appellant and to others if she were to operate a motor vehicle. It appears this declaration was the evidentiary basis for the disabilities imposed by the order appointing a temporary conservator.

Appellant has not addressed the existence of this declaration or whether it could be relied upon by the trial court. Thus, appellant's argument that the record lacks substantial evidence to support the findings about firearms and motor vehicles overlooks Dr. Song's opinions. The argument also overlooks the inferences reasonably drawn from the testimony about appellant's diagnoses and the symptoms of her mental disorder.

First, we address the opinions set forth in Dr. Song's declaration and whether those opinions are properly considered as evidentiary support for the trial court's finding that it would be dangerous, both for appellant and others, if appellant possessed a deadly weapon or operated a vehicle. Dr. Song was appellant's treating physician while appellant was at Bakersfield Behavioral Healthcare Hospital and had served in that role at least once in 2017. The testimony of a single witness, including an expert witness, may be sufficient to constitute substantial evidence. (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191.) However, when an expert bases his conclusion on factors that are speculative, remote or conjectural, or on assumptions not supported by the record, the expert's opinion cannot rise to the dignity of substantial evidence. (*Id*. at pp. 1191–1192.) Here, Dr. Song testified during the jury trial about his personal observation of appellant at daily meetings and confirmed that he received information regarding appellant from other sources. This testimony is sufficient to support the inference that Dr. Song's opinions were not based on speculation or conjecture, but on his observation of appellant. In addition, Dr. Song was called as a witness at trial and was available for

cross-examination. Therefore, we conclude Dr. Song's opinion regarding the dangers posed by appellant's possession of a firearm or her operation of a motor vehicle is part of the evidence to be considered when examining the sufficiency of the evidence.

Second, we address the testimony that appellant was diagnosed with schizoaffective disorder. Dr. Song described this disorder as a combination of schizophrenia and mood disorder and stated: "So you will have the symptoms of schizophrenia, which include delusions, hallucinations disorder, thoughts or behaviors or negative symptoms. When it comes to mood symptoms, you have to also meet criteria for either manic or mixed episodes." A few days before trial, Dr. Garewal diagnosed appellant as suffering from schizoaffective disorder bipolar type. Appellant testified she agreed with the diagnosis. In addition, Dr. Garewal testified schizoaffective disorder is a chronic (i.e., long-term) illness and, in his experience, about three-fourths of patients continue to have episodes or persistent psychosis.

In *George H., supra,* 169 Cal.App.4th 157, the court reviewed the evidence supporting the imposition of special disabilities affecting the conservatee's privilege to operate a motor vehicle and his right to contract. The evidence included testimony about the conservatee's mental illness and refusal to take medication. (*Id*. at pp. 161, 166.) The court concluded the evidence, including the evidence that the conservatee suffered delusional beliefs and auditory hallucinations, supported the order suspending his driving privileges. (*Id*. at p. 166.) Similarly, we conclude that the evidence regarding appellant's schizoaffective disorder—a disorder that includes delusions and hallucinations—supports the findings about the dangers of allowing appellant to possess a firearm or operate a motor vehicle.

To summarize, Dr. Song's opinions and the testimony about appellant suffering from schizoaffective disorder provides substantial evidence supporting the written findings that it would be dangerous to appellant and others to allow her to possess a

firearm or operate a motor vehicle. Accordingly, the imposition of the disabilities relating to firearms and motor vehicles is justified by the evidence.

C. The Right to Enter Contracts in Excess of $15

The petition alleged appellant lacked the capacity to enter into contracts in excess of $15, and the trial court found this allegation was true. Based on its finding, the court's order stated appellant "shall not enter into contracts in excess of $15.00."

Appellant contends she entered into a voluntary arrangement with a payee who has assisted her by taking control of her income and by paying certain expenses, such as rent. This action, she contends, shows she has recognized that she might have limitations in handling her finances and has dealt with them appropriately. She contends there was no evidence suggesting she overspent, had been victimized by con artists, or had real problems that required limiting her ability to enter into contracts.

The Public Conservator contends that once a conservator is appointed for the estate of a person, the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate. The Public Conservator argues the finding that appellant was gravely disabled, and the imposition of the conservatorship presents a sufficient evidentiary and legal basis for the imposition of the disability relating to contracts.

We conclude the evidence that appellant suffers from schizoaffective disorder and Dr. Song's opinion that she is not capable of entering into a contract constitutes substantial evidence supporting the imposition of the contractual disability. (See *George H., supra,* 169 Cal.App.4th at p. 166 [evidence showed appellant suffered delusional beliefs and hallucinations; evidence as a whole supported suspending his right to contract].)

D. The Right to Refuse or Consent to Medical Treatment

Two of the special disabilities relate to the right to refuse or consent to medical treatment. (§ 5357, subds. (d), (e).) One disability concerns "treatment related specifically to the conservatee's being gravely disabled." (*Id*., subd. (d).) The other addresses "routine medical treatment unrelated to remedying or preventing the recurrence of the conservatee's being gravely disabled." (*Id*., subd. (e).)[4]

Dr. Song's declaration stated his opinions that appellant was "not capable of giving informed consent for treatment related to her mental illness" or for "routine medical treatment." Dr. Song's testimony at trial addressed the difficulty the hospital had in getting appellant to accept treatment for her severe lice problem, a matter that eventually was resolved. After examining appellant a few days before trial, Dr. Garewal diagnosed her as suffering "from schizoaffective disorder bipolar type." He testified that discontinuing the medication of a person with that diagnosis would have a negative effect on the person's ability to function and perform daily activities such as getting up, showering, eating, dressing appropriately, and getting to sleep on time.

While under Dr. Song's care, appellant was medication compliant—that is, she took her prescribed medication every day. Dr. Garewal also testified that appellant was taking her medication at the MHRC. Despite the medication, Dr. Garewal stated that "she seems to be driven by internal stimuli, something going on in her own head, like conversations with imaginary persons," which he believed interfered with her judgment and insights. Based on her symptoms, he concluded she is most likely to be "driven by her psychosis and do nothing."

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4 Of the six special disabilities listed in section 5357, the one relating to routine medical care is unique in that the Legislature has directed that "[t]he [trial] court shall make a specific determination regarding the imposition of this disability." (*Id.*, subd. (e).) Here, the trial court's written order contains the required specific determination.

We conclude the foregoing testimony and the evidence relating to appellant's behavior during a prior conservatorship constitute substantial evidence supporting the disabilities relating to refusing or consenting to medical treatment.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant contends that to the extent her "challenge to the disabilities was in any way waived or forfeited, that waiver or forfeiture constituted ineffective assistance of counsel." Appellant argues that, regardless of whether counsel failed to object to the inclusion of the special disabilities in the judgment by mistake or actively worked to include them, either action constituted a deficient performance that was prejudicial to appellant. In appellant's view, her counsel could not have had a valid tactical reason for agreeing to the imposition of the special disabilities.

The Public Conservator disputes appellant's assertion that appellant's counsel could have no tactical reason for not raising the procedural issues related to the imposition of the special disabilities. The Public Conservator contends the assertion relating to tactics presents a question of fact that appellant has resolved using speculation, rather than evidence contained in the appellate record. The Public Conservator argues an appellate court should not make a factual determination about what an attorney was thinking when it considers a claim about the ineffectiveness of counsel. We agree.

The limited information provided by the record on appeal does not foreclose the possibility that appellant's attorney competently determined it was in appellant's best interests not to challenge the disabilities and, as a result, made a tactical choice not to challenge the disabilities. For example, appellant's attorney might have determined that possession of a firearm and a driver's license was not necessarily in appellant's best interest. First, appellant was being placed in a locked facility where the need for a driver's license or a firearm would be minimal. Second, the record does not show that appellant had a driver's license and access to a motor vehicle, or that she owned, wished

to purchase, or otherwise acquire a firearm. Thus, there may have been no practical reason to contest those special disabilities because their impact on appellant would have been minimal or nonexistent. Third, based on appellant's history and diagnosis, counsel may have concluded appellant's interests in her own safety and in not harming others justified not driving a motor vehicle or possessing a firearm. Similar concerns about appellant's best interests might have been the reason why counsel did not object to the disabilities relating to contracting and medical treatment. Whether such concerns actually were the basis for a tactical decision present questions of fact that appellate courts rarely address in the first instance. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 952 [review of ineffective assistance of counsel claim on direct appeal is limited to the appellate record].)

In criminal appeals where a claim of ineffective assistance of counsel is raised, appellate courts often note their review is limited to the appellate record and the presumption that counsel acted within the wide range of reasonable professional assistance when making a tactical decision. (See *People v. Mai* (2013) 57 Cal.4th 986, 1009.) Because rebutting this presumption typically requires evidence outside the record, claims of ineffective assistance of counsel generally are raised in habeas corpus proceedings, a process that allows for an evidentiary hearing. (*People v. Carrasco* (2014) 59 Cal.4th 924, 980–981.) Consequently, it is not uncommon for appellate courts to decline to decide an ineffectiveness assistance of counsel claim and state that if the defendant possesses or can obtain evidence that is not in the appellate record, the defendant may present the claim by way of a petition for writ of habeas corpus. (See *People v. Williams* (2013) 56 Cal.4th 630, 691 [some ineffective assistance claims "can be fully addressed only in a habeas corpus petition because they require investigation of evidence outside the record in order to potentially establish prejudice"]; *People v. Barella*

(1999) 20 Cal.4th 261, 272 [defendant's claim of ineffective assistance of counsel should be resolved in a habeas corpus proceeding rather than on appeal].)

Here, the claim of ineffective assistance of counsel cannot be resolved in the direct appeal because it involves questions of fact. Appellant has not asked this court to take evidence and make factual determinations pursuant to Code of Civil Procedure section 909 and California Rules of Court, rule 8.252. We note this authority is rarely exercised. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [authority should be exercised only in exceptional circumstances].) Moreover, the LPS provides a relatively simple mechanism for challenging the imposition of special disabilities that is superior to the rarely invoked procedure of an appellate court taking evidence and making factual determinations—specifically, the petition authorized by section 5358.3. Based on the foregoing, this court will not address the merits of appellant's claim of ineffective assistance of counsel.

DISPOSITION

The May 25, 2018 order appointing a conservator of the person and estate of appellant is reversed as to the special disability stating "Conservatee shall not retain the right to vote" and is affirmed in all other respects. The trial court is directed to enter a modified order containing no voting disability and to notify the Secretary of State and county election official that appellant has retained or been restored the right to register to vote, provided that such a notice is necessary to undo the effect of the voting disability imposed. No costs are awarded on appeal.

HILL, P.J.

WE CONCUR:

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DETJEN, J.

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SNAUFFER, J.